



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF ÜTEBAY v. TURKEY

(Application no. 40555/04)

JUDGMENT

This version was rectified on 30 January 2009
under Rule 81 of the Rules of Court

STRASBOURG

17 July 2008

FINAL

17/10/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ütebay v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 24 June 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 40555/04) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ekrem Ütebay (“the applicant”), on 1 October 2004.

2. By a letter of 11 March 2007, the Registry was informed of the death of the applicant. His parents, Mrs Muhteber Ütebay¹ and Mr İyasettin Ütebay², and his brother, Mr Ercan Ütebay, declared their intention to pursue the application.

3. For practical reasons, Mr Ütebay will continue to be called “the applicant” in this judgment, although his family is now to be regarded as such (see *Ahmet Sadık v. Greece*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1641, § 3).

4. The applicant was represented by Mr F. Babaoğlu, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

5. On 6 November 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

¹ Rectified on 30 January 2009. The former version read “Muteber Ütebay”.

² Rectified on 30 January 2009. The former version read “Gıyasettin Ütebay”.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lived in İstanbul. He died on 14 June 2005.

7. The facts of the case, as submitted by the applicant, may be summarised as follows.

8. On 7 March 1994 the applicant was taken into police custody in Muş on suspicion of being a member of the illegal PKK (the Kurdistan Workers' Party). On 13 March 1994 he was handed over to the Istanbul Security Directorate for further investigation.

9. On 21 March 1994 the applicant was taken before the investigating judge at the Istanbul State Security Court, who ordered his detention pending trial.

10. By an indictment dated 23 June 1994, the public prosecutor initiated criminal proceedings against the applicant and forty-five other defendants before the Istanbul State Security Court, accusing them, *inter alia*, of membership of an illegal armed organisation and of involvement in activities that undermined the constitutional order of the State. The prosecution requested that the applicant be sentenced pursuant to Article 125 of the Criminal Code.

11. On 5 May 1999 the Istanbul State Security Court, composed of three judges including a military judge, decided that the applicant's case should be separated from the file as his final defence submissions had not been submitted to the court.

12. On 18 June 1999 the Constitution was amended and the military judge sitting on the bench of the Istanbul State Security Court was replaced by a civilian judge.

13. The case against the applicant continued before the Istanbul State Security Court. In the course of the proceedings the State Security Court rejected the applicant's requests for release, taking into account the nature of the alleged offence and the state of the evidence.

14. On 5 April 2004 the applicant was released pending trial. The case was still pending before the domestic courts when the applicant died on 14 June 2005.

THE LAW

I. PRELIMINARY OBJECTION

15. The Government submitted that the case should be struck out of the Court's list of cases on the ground that the applicant's family were not affected by the alleged violations and could therefore not claim to be victims within the meaning of Article 34 of the Convention.

16. The Court reiterates that in a number of cases in which an applicant died in the course of the proceedings, it has taken account of the statements of the applicants' heirs or close family members expressing their wish to pursue the case before the Court (see, among many other authorities, *Dalban v. Romania* [GC], no. 28114/95, § 39, ECHR 1999-VI; *Latif Fuat Öztürk v. Turkey*, no. 54673/00, § 27, 2 February 2006; *Mutlu v. Turkey*, no. 8006/02, §§ 13–14, 10 October 2006). In the present case the Court considers that, apart from having explicitly expressed their wish to do so, the applicant's family have sufficient legitimate interests in obtaining a ruling that the length of the applicant's detention pending trial and the criminal proceedings against him was excessive, in breach of Articles 5 § 3 and 6 § 1 of the Convention.

17. In view of the above, the Court holds that the applicant's family has standing to continue the present proceedings in the applicant's stead. Consequently, the Government's objection that the case should be struck out is dismissed.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

18. The applicant complained that his detention pending trial had exceeded the “reasonable time” requirement of Article 5 § 3 of the Convention, which in so far as relevant, reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

19. The Government contested that argument.

A. Admissibility

20. The Government asked the Court to dismiss the application for failure to exhaust domestic remedies, pursuant to Article 35 § 1 of the Convention. With reference to the ruling of the Court in its *Ahmet Sadık v. Greece* judgment (cited above), they contended that the applicant had not raised his complaint before the domestic courts.

21. The applicant denied the Government's allegations.

22. The Court notes that, on various occasions during the proceedings, the applicant expressly complained about the length of his detention pending trial and unsuccessfully requested the trial court to release him. Against this background the Court finds that the applicant must be considered to have complied with Article 35 § 1. Consequently, the Court rejects the Government's objection.

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

24. The Government submitted that the applicant's detention pending trial had complied with domestic law. In view of the seriousness of the charges brought against him and the evidence in the case file, the court had prolonged that detention.

25. The Court notes that, in the instant case, the period to be taken into consideration began on 7 March 1994 with the applicant's arrest and ended on 5 April 2004, when the applicant was released pending trial. It thus lasted nearly 10 years and 1 month. During this period, the domestic courts prolonged the applicant's detention on remand using identical, stereotyped terms, such as "having regard to the nature of the offence, the state of evidence and the duration of detention".

26. The Court has frequently found violations of Article 5 § 3 of the Convention in cases raising similar issues to those in the present application (see, for example, *Atıcı v. Turkey (no. 1)*, no. 19735/02, § 50, 10 May 2007; *Dereci v. Turkey*, no. 77845/01, §§ 38-40, 24 May 2005; *Tacıroğlu v. Turkey*, no. 25324/02, § 24, 2 February 2006).

27. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, it considers that in the instant case the length of the applicant's detention pending trial was excessive and contravened Article 5 § 3 of the Convention.

28. There has accordingly been a violation of this provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

29. The applicant complained of a breach of the reasonable time requirement of Article 6 § 1 of the Convention, which provides as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

30. The Government contested that allegation.

31. The Court notes that the period to be taken into consideration began on 7 March 1994 when the applicant was taken into police custody. In the absence of any information in the case file as to whether, and if so when, the domestic courts decided to discontinue the proceedings in respect of the applicant after his death, the Court cannot determine the exact length of the period in question. However proceedings were pending at the time of the applicant's death on 14 June 2005 and had thus already lasted some eleven years and three months for one level of jurisdiction at that point.

A. Admissibility

32. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

33. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, and the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

34. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (*ibid.*).

35. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present application. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

37. Muhteber Ütebay¹, İyasettin Ütebay² and Ercan Ütebay claimed 20,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

38. The Government contested the claim.

39. The Court does not discern any causal link between the violations found and the pecuniary damage alleged; it therefore rejects this claim. However, it accepts that the applicant must have suffered some non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Consequently, taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 14,000 for non-pecuniary damage, to be paid jointly to his successors, Muhteber Ütebay¹, İyasettin Ütebay² and Ercan Ütebay.

B. Costs and expenses

40. Muhteber Ütebay¹, İyasettin Ütebay² and Ercan Ütebay also claimed EUR 7,000 for legal fees and costs and expenses.

41. The Government contested this claim.

42. Since no substantiation of this claim has been submitted, as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

C. Default interest

43. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

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² Rectified on 30 January 2009. The former version read “Gıyasettin Ütebay”.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay Muhteber Ütebay¹, İyasettin Ütebay² and Ercan Ütebay, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,000 (fourteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into new Turkish liras at the rate applicable at the date of the settlement;
 - (b) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 17 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President

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